ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-218

AMOS REED, et al.,

Petitioners,

v.

DANIEL ROSS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Barry Nakell
1900 Baseline Road
Boulder, Colorado 80302
(303) 492-7458
(303) 492-8047

Attorney for Respondent

STATEMENT OF THE CASE

The essential facts are as follows:

(A) Respondent was convicted in March, 1969, of first degree murder at a trial in which the court unconstitutionally instructed the jury that he had the burden of proof on his partial defense of lack of malice and also on his complete defense of self defense. North Carolina procedure did not require respondent to object to those instructions. Accordingly, this case does not involve a failure to comply with a contemporaneous objection rule at trial

(B) Respondent did appeal his conviction. Although he did not expressly challenge the constitutionality of the instructions imposing the burden of proof on him, the State Supreme Court held:

> "The court charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty . . . While the defendant did not point out and assign as error any particular or designated portion of the charge as required by appellate rules, we have examined the charge and conclude it is in accordance with legal requirements and is unobjectionable."

State v. Ross, 275 N.C. 550, 554, 169 S.E.2d 875, 878 (1969).

(C) The decision of the North Carolina Supreme Court was filed on October 16, 1969. This Court did not decide In re Winship, 397 U.S. 358 (1970), until over five months later, and did not decide Mullaney v. Wilbur, 421 U.S. 684 (1975), until five and one-half years later.

(D) Respondent promptly pursued state post-conviction remedies after this Court's decision in Mullaney v. Wilbur, supra, and Hankerson v. North Carolina, 432 U.S. 233 (1977). The North Carolina courts refused to give him the benefit of that decision because of his failure before either Winship or Mullaney had been decided to raise the issue on appeal. Nevertheless, the North Carolina courts have reviewed and set aside convictions in other cases on Mullaney grounds despite the failure of the defendants in those cases to raise the issue on appeal, e.g., State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975); State v. Hancock, No. 105 PC (N.C. Sup. Ct. Nov. 30, 1978), and the State Attorney

General has waived the procedural default in other cases. E.g., Wynn v. Mahoney, 600 F.2d 448, 450 n.1 (4th Cir.), cert. den., 444 U.S. 950 (1979).

REASONS FOR DENYING THE WRIT

The present case raises issues that involve the factual integrity of the adjudication of guilt in the state court. Hankerson v. North Carolina, 432 U.S. 233, 242 (1977). Although respondent was concededly convicted at an unfair trial in which due process violations substantially impaired the truth-finding process, the State contends that his conviction should be upheld simply because he did not raise the issue on appeal, even though he did appeal and even though he did raise the issue in the state courts as soon as this Court decided Mullaney and held that it applied to his trial, even though the state courts have decided the issue in other cases where it was not timely raised on appeal, and even though the State has waived the failure in similar cases. That contention is contrary to the holding of Fay v. Noia, and is not supported by any federally cognizable policy or any legitimate state interest.

I. In Fay v. Noia, 372 U.S. 391 (1963), this Court held that a state criminal defendant's failure to appeal from his conviction -- as long as it was not a deliberate by-pass of state remedies -- was not a bar to federal post-conviction review. That decision governs this case. Contra, Cole v. Stevenson, 620 F.2d 1055 (4th Cir.) (en banc, 6-3), cert. den. 449 U.S. 1004 (1980) (with three Justices voting to grant).*

It is clear that any effort by respondent to have raised the issue on his pre-Mullaney appeal would have been futile. After respondent's conviction had been affirmed the North Carolina Supreme Court rejected similar arguments in other cases. State v. Sparks, 285 N.C. 631, 643, 207 S.E.2d 712, 719 (1974); State

* In Cole, the majority decided that this Court overruled Fay v. Noia in footnote 8 in Hankerson v. North Carolina, 432 U.S. 233, 244 (1977), even though six days after deciding Hankerson this Court expressly declared that it was leaving for another day the question of the continuing validity of Fay v. Noia. Wainwright v. Sykes, 433 U.S. 72, 88, n.12 (1977).

v. Harris, 23 N.C. App. 77, 80, 208 S.E.2d 266, 268 (1974). Moreover, after Mullaney was decided the North Carolina Supreme Court held that it did not apply retroactively. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd, 432 U.S. 233 (1977). Thus, the State is insisting in respondent's case on a futile formality. Yet, as this Court recently held: "The law does not require the doing of a futile act." Ohio v. Roberts, 448 U.S. 56, 74 (1980).

II. Because the State Supreme Court on respondent's appeal reviewed the burden of proof instructions at respondent's trial on the merits, there is no state procedural bar to review of the same issue on federal habeas corpus. The Court of Appeals declined to reach this issue in view of its ruling in respondent's favor on another ground, but said: "The claim of waiver is not without some support, but we find it unnecessary to delve behind the rather elusive language of the opinion in an attempt to determine precisely what was in the minds of the justices of the North Carolina Supreme Court when they wrote." Ross v. Reed, Appendix to Petition, page 4 (4th Cir. 1983). Obviously, the North Carolina Supreme Court did not consider and decide the Mullaney issue in exactly those terms, for Mullaney had not yet been decided. The point is that the North Carolina Supreme Court decided that even though respondent did not assign the instructions on burden of proof as error, it was willing to review those instructions anyway, thus waiving the very procedural default that the State is now trying to insist on. As this Court held, if the state courts are not concerned about a procedural default, "a federal court implies no disrespect for the State by entertaining the claim." County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979); see also, Smith v. Bordenkircher, ____ F.2d ____, ____ (4th Cir. Oct. 5, 1983), slip op. at 6.

III. As the Court of Appeals decided: "This case falls within the 'cause and prejudice' exception as applied by the Supreme Court in Engle v. Isaac, 456 U.S. 107 (1982) and United

States v. Frady, 456 U.S. 152 (1982)." Ross v. Reed, Appendix to Petition, page 4 (4th Cir. 1983). The State contends that the Court of Appeals failed to follow footnote 39 in Engle. The Court's opinion, however, considered that contention carefully and answered it persuasively. Id. at 6-7. The State contends that the decision set "District Courts adrift to make unguided, subjective determinations of how many cases and how many prior years are necessary for novelty to wear off." Obviously, the courts are capable of fixing the line. See Solem v. Helm, 103 S. Ct. 3001, 3011 (1983). The courts confront this same question of "novelty" in the context of the qualified privilege for government officials. E.g., Ward v. Johnson, 690 F.2d 1098, 1111-1113 (4th Cir. 1982) (en banc); see also, Harris v. Young, No. 81-6800 (4th Cir. Aug. 16, 1983), slip op. at 7: "The key question to be answered is, when was the law on library or attorney access for prisoners in local jails so enunciated by the courts that a Virginia official knew or should have known that those rights were established."

This case, however, presents a clear example of a situation in which it was appropriate for the Court of Appeals to decide that the issue was novel at the time of respondent's appeal, that respondent's counsel had no basis for asserting it at that time, and that therefore there was cause for the failure to do so:

(1) This Court has recognized that Winship "laid the basis" for this constitutional claim. Engle v. Isaac, supra, 456 U.S. at 131. Respondent's appeal was concluded well before Winship was decided.

(2) The State has contradicted its own position in this regard on two occasions, and shown that even it accepts that the Mullaney doctrine was "novel" in this sense at least until Winship was decided and perhaps not until Mullaney:

(a) Before this Court in Hankerson v. North Carolina, supra, the State of North Carolina argued in its brief against retroactive application of Mullaney because it said the issue did not exist until Mullaney was decided.

(b) Before the Court of Appeals in this case, in arguing that the State Supreme Court had not decided this issue on respondent's appeal, the State argued: "(A)s petitioner has consistently pointed out, the issue here was not a widely litigated one at the time of his appeal making the odds overwhelming that the Supreme Court did not have it in mind when it spoke as it did."

(3) The North Carolina courts certainly did not perceive the issue as they continued to give and approve the unconstitutional instructions.

IV. If the "novelty" of the issue was not cause for respondent's failure to raise it, respondent's counsel had the responsibility to raise it. In that situation, counsel's failure to do so deprived respondent of the constitutionally mandated effective assistance of counsel, and the reversal of his conviction should be upheld on that ground.

Conclusion

For the foregoing reasons,*/ respondent respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

Barry Nakell

Barry Nakell
1900 Baseline Road
Boulder, Colorado 80302
(303) 492-7458
(303) 492-8047

Counsel for Respondent

*/ As the Petition points out, the State has released respondent and he has now enrolled as a student at North Carolina Central University. The State acquiesced in an order by the District Court for respondent's release after the decision by the Court of Appeals. Respondent does not assert that circumstance as a reason for denying the petition. The State should be encouraged to release prisoners in respondent's position, and should therefore not suffer any prejudice to its legal position for doing so.

CERTIFICATE OF SERVICE

I hereby certify that I served one copy of the foregoing Motionfor Leave to Proceed in Forma Pauperis on all counsel required to be served by mailing a copy, first class postage prepaid, addressed as follows:

Mr. Richard N. League
Special Deputy Attorney General
Box 629
Raleigh, NC 27602

Barry Nakell
Barry Nakell

Dated: October 26, 1983